

Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice

Date: 7 June 2023

Public Authority: Bristol City Council
Address: The Council House
College Green
Bristol
BS1 5TR

Decision (including any steps ordered)

1. The complainant has requested information relating to a landowner statement. The above public authority ("the public authority")'s final position was to rely on regulations 12(5)(b) – course of justice – regulation 12(4)(d) – material in the course of completion – and regulation 12(4)(e) – internal communications – of the EIR to withhold information.
2. The Commissioner's decision is that the public authority has correctly relied on regulation 12(5)(b) to withhold some of the information and the balance of the public interest favours maintaining this exception. Most of the information also engages regulation 12(4)(e) and, where it does, the Commissioner is satisfied that the balance of the public interest favours maintaining that exception. None of the information engages regulation 12(4)(d). There is a small quantity of emails that do not engage any exception and must therefore be disclosed. The public authority also breached regulations 11 and 14 of the EIR in its handling of the request.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose, to the complainant, the emails identified in the confidential annex. The public authority should make appropriate redactions in line with its data protection obligations.

4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

5. The Commissioner is aware that the request relates to an ongoing dispute over a piece of land known as Stoke Lodge Playing Fields. This land is owned by the public authority, but leased to Cotham School. Local residents have made several, unsuccessful, attempts to give the land Town or Village Green status – which restricts the uses to which the land can be put. To be given Town or Village Green status, applicants must demonstrate that the public has enjoyed unrestricted access to the land for at least twenty years prior to the date of application.
6. Under the Commons Act 2006, the owner of a piece of land can make it harder for that land to be given Town or Village Green status by depositing a landowner statement with the local Commons Registration Authority (in practice, usually the local council). A landowner statement is a declaration, by the owner of the land, that they do not intend for the public to acquire right of use or right of way over that land.
7. Once a landowner statement has been deposited, there is a one year grace period for anyone to make a further application for Town or Village Green Status on the basis of 20 years' continuous use prior to the date of deposit. If no successful application is made during that time, no further application can be made until at least 20 years after the landowner statement was deposited. The landowner is also entitled to deposit further statements every 20 years to prevent further applications for Town or Village Green status (on the basis that lawful public use could not have continued for 20 consecutive years because of the previous landowner statement).

Request and response

8. On 22 October 2022, the complainant wrote to the public authority and requested information in the following terms:

“This is a request to provide copies of all information held on your systems relating to correspondence/discussions (both within the Council and with third parties) about the possibility of issuing a 'landowner statement' in relation to Stoke Lodge Playing Fields.”

9. The public authority responded on 4 January 2023. It relied on regulation 12(4)(b) of the EIR and refused the request as manifestly unreasonable – a position it upheld following an internal review.

Scope of the case

10. At the outset of the investigation the Commissioner wrote to the public authority to set out his initial view of the complaint. He noted that he had upheld a number of recent complaints relating to the public authority's reliance of regulation 12(4)(b) to refuse similar requests and that, all other things being equal, there was a very high chance of him doing the same again.
11. The public authority reconsidered its stance and issued a fresh response on 2 May 2023. It no longer relied on regulation 12(4)(b) to refuse the request. Instead it relied on regulations 12(5)(b), 12(4)(d) and 12(4)(e) to withhold the requested information.
12. Where a public authority has applied two or more exceptions to the same piece of information, it is entitled to aggregate the public interest in applying all of those exceptions.
13. The public authority has applied three separate exceptions, but has not specified the information to which each exception has been applied. It's response of 2 May 2023 merely states that each exception applies to "some of" the withheld information.
14. In the interests of expediency and given that the public interest can be aggregated, the Commissioner has proceeded on the basis that the public authority intended to apply all three exceptions to all of the withheld information.
15. As regulation 12(5)(b) carries the strongest weight in favour of withholding information, the Commissioner will determine the extent to which this exception applies first. Once that is complete, he will determine whether any of the information engages 12(4)(e) and then 12(4)(d). Only once he has decided which information engages which exception(s) will the Commissioner consider the balance of the public interest.

Reasons for decision

Is the requested information environmental?

16. Regulation 2(1) of the EIR defines environmental information as being information on:
- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
 - (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
 - (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a)...as well as measures or activities designed to protect those elements;
 - (d) reports on the implementation of environmental legislation;
 - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
 - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);
17. As it is information relating to land use, the Commissioner believes that the requested information is information on a measure affecting the elements of the environment. For procedural reasons, he has therefore assessed this case under the EIR.

Regulation 12(5)(b) – course of justice

18. A public authority can rely on this exception to withhold information whose disclosure would adversely affect the course of justice.

19. The public authority has relied on this exception to withhold information that it considers to be covered by legal professional privilege.
20. There is ample case law around the use of this exception in respect of legally privileged material. Because legal privilege is considered a fundamental cornerstone of our justice system, any disclosure which undermines the principle of privilege is automatically considered to have an adverse effect on the course of justice in general. A public authority need not demonstrate that disclosure would have a harmful impact on any specific set of proceedings.
21. The Commissioner recognises that a number of the emails in the chain are either requests for legal advice or discuss the contents of legal advice that has been provided. As such, these emails are covered by legal advice privilege and, as such, regulation 12(5)(b) of the EIR is engaged.
22. There are some emails that appear to have been exchanged between lawyers, but do not engage privilege. The fact that the sender or recipient of a piece of correspondence has a legal qualification does not automatically mean that the correspondence is privileged. To be privileged, the correspondence must have been made for the purpose of seeking or providing legal advice.

Regulation 12(4)(e) – internal communications

23. Regulation 12(4)(e) of the EIR will apply to any communication that has been sent internally. A “communication” is something intended to transfer information from a person to one or more other people. This could include letters, emails or memos – or it could include private messages, audio or video recordings.
24. In order to be an “internal” communication, the particular communication in question must have remained within the public authority. It must not have been sent to, or copied to, anyone outside the organisation.
25. The Commissioner notes that in some cases the email chains begin with external correspondence which is then shared internally. Where that is the case, any subsequent correspondence which shares the external correspondence will still be an internal communication – providing that the correspondence remains within the organisation. As soon as one email in a chain is shared outside of the public authority, all the previous correspondence within that chain ceases to be an internal communication – because it has been seen by one or more external parties. The original external correspondence in each such chain does not engage the exception.

26. The remaining emails only appear to have been shared within the organisation and therefore engage regulation 12(4)(e).

Regulation 12(4)(d) – material in the course of completion

27. Regulation 12(4)(d) allows a public authority to withhold information if it relates to material “in the course of completion”. The information itself does not have to be incomplete or unfinished to engage the exception – providing it relates to material that is. The exception is designed to provide protection for a public authority’s “internal thinking space”.
28. There is no precise definition of what “material in the course of completion” actually means, but in *Highways England Company Ltd v Information Commissioner and Henry Manisty* [2019] AACR 17, the Upper Tribunal held that “material” must have some form of physical existence. It cannot incorporate a process or a decision.
29. The public authority explained to the Commissioner (and this is borne out in the withheld information) that it had previously considered issuing a landowner statement, but had decided not to. It was currently in the process of producing a draft statement. It originally argued that the withheld information related to that draft statement. However in further submissions to the Commissioner it accepted that the most recent set of discussions had not begun at the point the request was originally made.
30. On the basis of the available evidence, the Commissioner is not satisfied that the withheld information relates to material in the course of completion.
31. None of the withheld information could reasonably be said to relate to any current draft statement – as the public authority has confirmed that it only began considering this after the request was made.
32. Even if discussions had begun prior to the date of the request, the Commissioner is still sceptical that the exception would apply. For this purpose, whether a public authority has decided **to do** something or **not do** something is immaterial. Either way it has made a decision – marking the completion of that piece of work.
33. If the public authority has begun work on producing a landowner statement, but decided not to issue one, that statement (the “material”) is then complete – because the public authority has made a decision that the statement will not be used. There has been a natural break in the private thinking the public authority is undertaking. If circumstances change such that, at a later date, the public authority decides that it does wish to issue such a statement, it would be the new version of the statement that would be the material in the course of completion and to which any information attracting the exception would

need to relate. The public authority cannot simply rely on the exception on the basis that, whilst it has made a formal decision not to proceed with a piece of work, it may revisit that decision in future.

34. The Commissioner is satisfied that the withheld information does not relate to the current draft statement nor to any other material which is in the course of completion. Regulation 12(4)(d) therefore does not apply.
35. It follows that some information does not engage any of the above exceptions and must therefore be disclosed. The Commissioner has specified the information to be disclosed in the Confidential Annex.

Public interest test

36. There are two categories of information to consider for the public interest test. The first is the emails which engage **both** regulation 12(5)(b) and regulation 12(4)(e). The second is the emails that engage 12(4)(e) **only**.
37. In respect of both categories, the Commissioner notes that the broader issues surrounding rights of access to Stoke Lodge playing fields have been controversial. It is clearly a matter that is important in the local area and this suggests a reasonably strong (if geographically concentrated) public interest in the information.
38. The Commissioner is also aware that previous decision-making by both the public authority¹ and by Cotham School² has been found, by independent organisations, to be flawed. That would amplify the general public interest in transparency and accountability.
39. Set against that, the Commissioner also notes that there is a public interest in allowing a public authority to have a private space in which to think and develop ideas – especially when that relates to controversial matters.
40. In relation to the first category of information, the Commissioner also recognises that there is a very strong public interest in preserving the principle of legal professional privilege and preventing any adverse effect on the course of justice.

¹ <https://www.bristolpost.co.uk/news/local-news/unlawful-decision-grant-stoke-lodge-1714733>

² <https://www.bristolpost.co.uk/news/bristol-news/stoke-lodge-row-cotham-schools-8054384>

Balance of the public interest

41. Taken together, the aggregated public interest in maintaining both exceptions easily outweighs the public interest in disclosure of the first category of information.
42. Where it is found that information is covered by legal privilege, it follows that there must be extremely strong public interest factors which would override the public interest in protecting that principle. Whilst the Commissioner accepts that there is a public interest in disclosure of the information, he does not consider that it comes close to outweighing the public interest in protecting the principle of privilege.
43. Whilst this exception would be sufficient, on its own, to justify withholding the information, the Commissioner also notes that the public authority is entitled to add to it the (considerably more modest) public interest in protecting its thinking space.
44. In respect of the second category of information, whilst the public interest in withholding this information is considerably lower than for the first category, the public interest in disclosure is also considerably lower.
45. Once the legally privileged information has been removed from each email trail, what is left mainly consists of correspondence chasing responses to earlier (privileged) correspondence.
46. Once the first category of information is removed from the withheld information as a whole, the remaining information loses its context and becomes largely incomprehensible. It would reveal very little about the public authority's decision-making or the wider issues around Stoke Lodge.
47. Therefore, in respect of both categories of information – albeit for different reasons – the Commissioner is satisfied that the balance of the public interest favours maintaining the exceptions that have been correctly applied.

Procedural matters

48. The public authority breached regulation 14 of the EIR as it failed to issue its refusal notice within 20 working days of receiving the request.
49. The public authority breached regulation 1 of the EIR as it failed to carry out a reconsideration (internal review) of its original response within 40 working days of receiving a request for such a reconsideration.

Right of appeal

50. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

51. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
52. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Roger Cawthorne
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